



**U.S. Department of Justice**

Federal Bureau of Investigation

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*Electronic Surveillance Technology Section  
14800 Conference Center Drive, Suite 300  
Chantilly, VA 20151*

July 11, 2003

**VIA ELECTRONIC SUBMISSION**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation  
Wireline and Cable Modem  
Broadband Internet Access Proceedings  
CC Docket Nos. 02-33, 95-20, 98-10  
and CS Docket No. 02-52

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, the Department of Justice and the Federal Bureau of Investigation hereby submit the attached memorandum summarizing the substance of an *ex parte* presentation made to the Commission staff on July 10, 2003 in the above-referenced proceedings.

The Commission staff members who attended the *ex parte* presentation were Carol Matthey, Brent M. Olson, and Tom J. Beers of the Wireline Competition Bureau, Kyle D. Dixon, Barbara Esbin, Eric Bash, John Kiefer, Alison Greenwald, and Priscilla Lee of the Media Bureau, and J. Scott Marcus of the Office of Strategic Planning and Policy Analysis.

Any questions concerning the above matter should be directed to the undersigned.

Respectfully submitted,

/s/ Martin J. King

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Attachment

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DOJ AND FBI EX PARTE  
PRESENTATION  
IN THE FCC'S  
BROADBAND INTERNET  
ACCESS PROCEEDINGS

July 10, 2003



**DOJ AND FBI EX PARTE PRESENTATION**  
**IN THE FCC'S BROADBAND INTERNET ACCESS PROCEEDINGS**

July 10, 2003

The following is an ex parte presentation by the Department of Justice and the Federal Bureau of Investigation in the Federal Communications Commission's pending wireline broadband Internet access proceeding in CC Docket Nos. 02-33, 95-20, and 98-10 and the cable modem broadband Internet access proceeding in CS Docket No. 02-52 (the "Broadband Proceedings").

The ex parte presentation proposes to reconcile the Commission's obligations under the Communications Assistance for Law Enforcement Act ("CALEA") with the goals of the Broadband Proceedings. Specifically, the DOJ and FBI request the Commission to rule that wireline and cable modem Internet access providers are "telecommunications carriers" subject to CALEA but have no CALEA obligations insofar as they are engaged in providing information services.

- I. **The purpose of CALEA is to require telecommunications carriers and their vendors to develop intercept solutions for lawful electronic surveillance while protecting the privacy of communications and without impeding the introduction of new technologies**
- A CALEA applies to “telecommunications carriers,” including both common carriers and any “person or entity” engaged in switching or transmission service “to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service.” CALEA Section 102(8).
- B. CALEA applies to telephony in existence in 1994 when the statute was enacted, as well as services introduced subsequently. Thus, any service introduced after 1994 that meets the criteria of CALEA Section 102(8) should be deemed covered by CALEA.

## **II. The FCC is the agency responsible for determining the scope and applicability of CALEA**

- A Section 229 of the Communications Act requires the Commission to “prescribe such rules as are necessary to implement the requirements” of CALEA.
- B. Where the Commission cannot meet the goals of CALEA by classifying entities as “telecommunications carriers” under Section 102(8)(A), Congress authorized the Commission to classify entities as “telecommunications carriers” through the alternative analysis of CALEA Section 102(8)(B)(ii), which governs services that constitute a replacement for a substantial portion of common carrier telephony.

### **III. Law enforcement requires CALEA-standardized intercept capabilities in networks migrating to broadband telephony**

- A. The Commission has recognized that broadband networks may ultimately replace narrowband networks. This trend offers increasing opportunities for terrorists, spies, and criminals to evade lawful electronic surveillance. However, the Commission has not yet ruled that CALEA covers broadband telephony (otherwise known as “IP telephony,” “Internet telephony,” or VoIP”), there is no safe-harbor CALEA solution for broadband telephony, and broadband telephony involves packet-mode communications, which are more difficult to intercept than circuit-mode communications.
- B. The need for CALEA-standardized broadband intercept capabilities is especially urgent in light of today’s heightened threats to homeland security and the ongoing tendency of criminals to use the most clandestine modes of communication.
- C. Public uncertainty over whether CALEA covers broadband telephony is hampering the goals of the statute, which are to help law enforcement keep pace with changing technologies, encourage carriers to develop intercept solutions at the service design stage, isolate communications in a manner that protects customer privacy, and refrain from impeding the introduction of new technologies.

**IV. If the Broadband Proceedings result in a ruling that hinders CALEA applicability to broadband telephony, the Commission may further undercut the goals of the statute**

- A. The Broadband Proceedings solicit comment on how the Commission's tentative regulatory classification of Internet access as an "information service" would affect any explicit statutory provisions such as CALEA.
- B. There are two ways to deliver broadband telephony using DSL or cable modem Internet access:
  - 1. The communication originates in packet mode from a software-equipped PC, an analog phone connected to an ATA box, or a "SIP" phone, and is sent to an Internet access server for routing and transport over the Internet. The communication set-up functions are performed by the Internet access provider, perhaps in conjunction with an Internet application provider. The communication may be terminated at another software-equipped PC, an analog phone connected to an ATA box, or SIP phone, or terminated in circuit mode on the PSTN.
  - 2. The communication is originated, transported and terminated as above, except most communication set-up functions are performed by an Internet application provider that is not affiliated with the Internet access provider.
- C. Any classification of Internet access as an information service would implicitly classify broadband telephony delivered via Internet access as an "information service," thus raising doubts about whether those access providers are "telecommunications carriers" for purposes of CALEA.



**V. The Commission should rule that CALEA applies to any transmission used by wireline or cable modem Internet access providers for services such as broadband telephony**

- A. The advent of broadband telephony is just the kind of situation where Section 229 of the Communications Act requires the Commission to preserve the government's ability to conduct lawful interceptions.
- B. Ruling that CALEA covers broadband telephony, including broadband telephony delivered via Internet access, is required to meet the other above-stated statutory goals.
- C. CALEA contains no exemption for telephony provided through Internet access.

**VI. The Commission should specifically rule that for purposes of CALEA, wireline and cable modem Internet access providers are “telecommunications carriers” but have no CALEA obligations insofar as they are engaged in providing information services**

- A. If an Internet access provider offers broadband telephony service to the public for a fee (i.e. on a common carrier basis) it meets the definition of “telecommunications carrier” set forth at CALEA Section 102(8)(A).
- B. If a wireline or cable modem Internet access provider merely enables the broadband telephony service as part of the Internet access service, without marketing the broadband telephony to the public for a fee, the Commission should deem the entity a “telecommunications carrier” under the alternate analysis of CALEA Section 102(8)(B)(ii), which governs certain substantial replacements for common carrier telephony.
  - 1. CALEA Section 102(8)(B) does not require a finding that the service is offered on a common carrier basis. As long as the entity provides transmission or switching and meets the other elements of the statutory provision, it is still covered.
  - 2. Broadband telephony is already a replacement for a substantial portion of the local telephone exchange service, judging from the geographic reach of the service, the service features, and the number of subscribers.
  - 3. It is certainly in the public interest to deem a broadband telephony provider to be a telecommunications carrier based on the need to protect national security and public safety.
- C. The “information services” exemption of Section 102(8)(C) would continue to apply to entities insofar as they are engaged in providing information services.

**VII. Classifying wireline and cable modem Internet access providers as telecommunications carriers subject to CALEA would be consistent with the FCC's past CALEA rulings**

- A. Conventional telephony is already covered by CALEA.
- B. The Commission has ruled that CALEA covers digital dispatch and other narrowband packet based telephony.
- C. The Commission has ruled that CALEA covers broadband “dual-use” facilities such as DSL.
- D. The Commission has ruled that a carrier's choice of technology when offering common carrier services does not change its obligations under CALEA.

**VIII. The proposed regulatory classification is consistent with the classifications of the Communications Act**

- A. Internet access providers that offer broadband telephony on a common carrier basis would be definable as telecommunications carriers under both CALEA and the Communications Act.
- B. Internet access providers that merely enable broadband telephony on a non-common carrier basis would be properly classified as telecommunications carriers under CALEA but not under the Communications Act.
  - 1. Congress included the replacement clause to make the CALEA definition of telecommunications carrier broader than the Communications Act definition.
  - 2. The Commission has expressly stated that entities and services are subject to CALEA based on the CALEA definitions, regardless of their classification for the separate purposes of the Communications Act.
  - 3. In any event, the replacement clause is unique to CALEA and therefore would not create confusion with other regulatory mandates.
- C. The proposed classification would track the Communications Act definition of “information service” because insofar as wireline or cable modem Internet access providers are engaged in providing information services they would have no CALEA obligations.

**IX. The proposed classification is consistent with the functional approach of the Stevens Report and the Broadband Proceedings**

- A. The Stevens Report did not address Internet access providers that offer broadband telephony on a common carrier basis. However, applying the principles of the Stevens Report, that form of telephony certainly functions as a telecommunications service.
- B. As for Internet access providers that merely enable broadband telephony on a non-common carrier basis, the Stevens Report regarded such arrangements as information services, but certain technological advances not considered by the Stevens Report warrant a revisiting of the issue. Today, a subscriber can use an ATA box or SIP phone to make its Internet access function exclusively as a high-quality telecommunications service.

**X. The proposed classification is consistent with the policy goals of the Broadband Proceedings**

- A. The Commission could still encourage the ubiquitous availability of broadband services because CALEA does not prohibit the development of such services. In addition, CALEA contains protections for carriers that need more time to comply or find compliance is not reasonably achievable.
- B. The proposed classification would promote competition in the provision of broadband capabilities by treating both common carrier and non-common carrier broadband telephony services alike.
- C. Broadband services would still be subject to minimal regulation because CALEA coverage would not force the Commission to impose any other regulatory mandates.
- D. The proposed analytical framework is consistent across multiple platforms because wireline and cable modem Internet access would be equally subject to CALEA.

**XI. Where wireline or cable modem Internet access providers are unable to achieve full compliance with CALEA for technical reasons, the Commission should require such providers to comply as fully as possible under the standards of the statute**

- A. Internet access providers may be unable to isolate the call-identifying information of any one service, such as broadband telephony, that runs through the access “pipe” because their systems are not designed to monitor and filter packets at that high “application” level of the OSI Reference Model.
- B. Accordingly, the Commission should require the entity to deliver the next best thing to full compliance, which is the call identifying information available at the lower “IP” and “port” levels. The information would include the Internet access source and destination IP addresses, port numbers, and address registration information. Law enforcement would perform the required minimization.
- C. Although such delivery might normally be considered overbroad because it would include all IP and port level addressing, not just service-specific addressing, the Commission has already used a similarly broad approach, combined with law enforcement minimization, where the complexities of packet mode communications threatened to frustrate CALEA compliance. In any event, delivering IP addressing information is far more protective of privacy than the alternative, which is to give access to the “full pipe.”
- D. Where an Internet access provider is required but unable to isolate the content of a communication, the Commission could similarly require carriers to make the full pipe available and leave law enforcement to perform the required minimization. This approach is already used when ISPs provide non-CALEA technical assistance for lawfully ordered electronic surveillance.